Congressional Research Service

Memorandum

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SUBJECT: **National Security Issues and the Proposed U.S.–Oman Free Trade Agreement**

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This memorandum responds to requests for a legal analysis of arguments raised in opposition to the proposed Oman Free Trade Agreement (FTA) as they relate to the United States' ability to invoke the "essential security" exception of the FTA to prevent either Omani government-controlled companies or privately-owned companies in Oman (collectively Omani companies) from establishing "landside aspects of port activities" in the United States. The argument appears to assert that should the United States, whether through an action by the Committee on Foreign Investment in the United States (CFIUS)[1] or by legislative action of Congress, prevent Omani companies from establishing port operations such actions would violate the proposed Oman FTA and be subject to review by an international arbitration panel. Furthermore, the argument contends that such a panel would be empowered to issue a judgment on the validity of U.S. national security measures. The argument also asserts that there is international precedent in the World Trade Organization (WTO) for the proposition that such national security claims are legally justiciable by dispute settlement panels. This memorandum discusses the "essential security" exception in general terms and does not discuss any particular dispute settlement scenario or the invocation of the exception in any specific case.

The proposed Oman FTA, like all of the United States's predecessor trade agreements dating back to the 1947 General Agreement on Tarriffs and Trade (GATT), contains an "essential security" or "national security" exception along with other more general exceptions, that permit the adoption of certain measures that may otherwise violate the agreement. Article 21.2 of the proposed Oman FTA states that:

> Nothing in this Agreement shall be construed: (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (b) to preclude a Party from applying measures that it

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[1] *See* 50 U.S.C. App. § 2170 (2000) (commonly referred to as the Exxon-Florio Provision); *see also* Executive Order 1266, *reprinted at*, 54 Fed. Reg. 779 (Dec. 27, 1988) (delegating Presidential responsibility for implementation of the Exxon-Florio provisions to CFIUS).

> considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security or the protection of its own essential security interests.[2]

Similar to the language contained in Article XXI of the GATT,[3] Article 21.2 of the proposed Oman FTA is arguably intended to remove legitimate national security matters from the scope of obligations, and to discourage use of the exception for measures with commercially-inspired goals.[4] Moreover, the United States, among other countries, has consistently taken the legal position that national security exceptions containing language identical to Article 21.2 are "self-judging" – *i.e.*, that it is for an individual country to determine whether a particular matter is necessary for the protection of its essential security interests – and that national security matters are not appropriate for adjudication in a third-party dispute settlement mechanism.[5]

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[2] *See* Final Text of the Proposed Oman FTA, Art. 21.2, *available at*, http://ustr.gov/assets/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/asset_upload_file397_8846.pdf [hereinafter Oman FTA].

[3] Article XXI of the GATT provides that:

> Nothing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which *it considers contrary to its essential security interests*; or (b) to prevent any contracting party from taking any action *which it considers necessary for the protection of its essential security interests* (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

See World Trade Organization, Text of the 1947 General Agreement on Tarriffs and Trade, *available at*, http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf (emphasis added)[hereinafter GATT].

[4] World Trade Organization, *Guide to GATT Law and Practice* 600 (updated 6th ed. 1995)[hereinafter GATT Analytical Index]; *see also* John H. Jackson, *World Trade and the Law of GATT* 748-52 (1969)[hereinafter Jackson].

[5] "U.S. Says WTO Panel Not Competent to Judge Cuba Dispute, Hopes to Settle," 14 Int'l Trade Rep. 351 (BNA 1997); *see also* David T. Shapiro, *Be Careful What You Wish For: U.S. Politics and the Future of the National Security Exception to the GATT*, 3 GEO. WASH. J. INT'L L. & ECON. 97 (1997); GATT Analytical Index, *supra* note 4, at 600-601. In addition, there is language affiriming the position of "self-judging" in Executive Branch statements regarding the "essential security" exception in U.S. bilateral investment treaties (BITs). For example, the U.S.-Jordan BIT provides at Article XIV:1: "This Treaty shall not preclude a Contracting Party from applying measures necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests." In addition, identical language also appears in the Bahrain BIT at Article 14:1. *See* U.S. Investment Treaty with Bahrain, S. Treaty Doc. 106-25, 106th Cong. 2d Sess. (May 23, 2000). The State Department stated in the document transmitting the U.S.- Jordan BIT to the Senate that: "Measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith." *See Investment Treaty with Jordan*, S. Treaty Doc. 106-30, at xiii (July 2, 1997). The treaty entered into force June 12, 2003. *See* United States Dep't of State, U.S. Bilateral Investment Treaty Program, *available at*,

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Close examination of the plain text of essential security exceptions, especially when compared with the language of the other, more general, exceptions appears to support the United States's legal position. Specifically, the essential security exception states that nothing shall preclude a Party from taking an action that "*it considers necessary* for the fulfillment of its obligations with respect to ... protection of its own essential security interests."[6] By its plain text this language suggests a "subjective" basis for consideration, rather than an "objective" one. Stated another way, the language "it considers necessary" appears to leave the ultimate determination of when and if the essential security exception should apply to the individual Party, not a third-party tribunal. The language could easily have provided an "objective" standard had it simply said "necessary," however, the language appears to clearly reject this formulation, thereby leaving the determination of national security to each individual country that is a signatory to the agreement.

Compare the arguably "subjective" language of Article 21.2 to the general exceptions found in GATT Article XX, and incorporated by reference in Article 21.1 of the proposed Oman FTA.[7] GATT Article XX states, in part, that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) *necessary* to protect public morals; (b) *necessary* to protect human, animal or plant life or health ... (d) *necessary* to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement ....[8]

In this exception, the language arguably establishes "objective" standards for determining when the exception may apply through the omission of the phrase "it considers." By also requiring that the measures not constitute a means of "unjustifiable discrimination between countries where the same conditions prevail" or that they not be a "disguised restriction on international trade" the language seems to provide judicially determinable standards under which a third-party tribunal can evaluate claims arising under this language. In other words, it appears possible for third-party tribunals to determine whether a measure unjustifiably discriminates or is a disguised restriction on trade. Unlike the essential security exception,

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[5] (...continued)
http://www.state.gov/e/eb/rls/fs/22422.htm. Further evidence in support of this position can be found in the supporting documents to the U.S.– Bahrain BIT, where the State Department asserted that the "Treaty makes explicit the implicit understanding that measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provision to be applied to the other in good faith." *See Investment Treaty with Bahrain*, S. Treaty Doc. 106-25, 106th Cong. 2d Sess. at XIII (May 23, 2000).

[6] *See* Oman FTA, *supra* note 2 (emphasis added).

[7] *See id.* at Art. 21.1 (stating that "[f]or purposes of Chapters Two through Seven (National Treatment and Market Access for Goods, Textiles and Apparel, Rules of Origin, Customs Administration, Sanitary and Phytosanitary Measures, and Technical Barriers to Trade), Article XX of GATT 1994 and its interpretive notes are incorporated into and made part of this Agreement, *mutatis mutandis*").

[8] GATT, *supra* note 3 at Art. XX (emphasis added).

determinations under the Article XX general exceptions are not left to the individual Parties, and, in fact, have been the subject of numerous dispute settlement decisions.[9]

The proper interpretation of the clause has raised questions not only as to the appropriate role of dispute settlement panels in this area, but also as to the treatment of national security matters within an international trade organization, especially in light of the evolution of the GATT and its dispute resolution procedure from a negotiating forum into what is more of a rules-based system. With the entry into force of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and its negative consensus rule for the establishment of panels (*i.e.,* a panel will be established at the second meeting of the WTO Dispute Settlement Body at which the request appears as an agenda item unless at the meeting all WTO Members agree not to establish it), a panel may be established where a complaining Member persists in its panel request even though a defending Member has claimed or otherwise indicated that the challenged measure is covered by Article XXI.[10] To date, however, there have been no GATT or WTO panel or appellate reports examining the scope or application of the "essential security" provision. This history seems to contradict the argument that there is international precedent at the WTO for the justiciability of national security issues. The history and precedent appear to indicate the opposite, namely, that no third-party dispute panel has ever heard any arguments, much less issued a decision relating to the scope and application of any national security exception contained in an international trade or investment agreement.

Since the inception of the WTO and its predecessor agreement, the GATT, the United States has attempted to invoke the national security exemption twice in the context of specific disputes. In both cases the United States advanced a similar argument regarding the proper interpretation and effect of the national security exemption. In 1985, with respect to trade measures affecting Nicaragua, the United States invoked the national security exception for the first time.[11] On May 1, 1985, President Reagan imposed an embargo on all trade with Nicaragua except for items destined for anti-Sandinista forces "in response to the emergency situation created by the Nicaraguan Government's aggressive activities in Central America."[12] Nicaragua objected to the embargo in the GATT, arguing that it violated Articles I, II, V, XI, XIII, and Part IV of the GATT.[13] The United States responded that it had acted for national security reasons; that its measures were covered by Article XXI (b)(iii);

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[9] *See e.g.,* Appellate Body Report, *EC – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R (Mar. 12, 2001); *see also* Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998); Appellate Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996); Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996).

[10] *See* WTO Dispute Settlement Understanding, Art. VI:(1), *available at*, http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (stating that "[i]f the complaining party so requests, a panel ***shall*** be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel") (emphasis added).

[11] *See* GATT Analytical Index*, supra* note 4, at 604.

[12] *See* Exec. Order No. 12513, 50 Fed. Reg. 18,629 (1985) and President's Message to the Congress, 21 Weekly Comp. Pres. Docs. 567 (1985).

[13] *GATT Analytical Index, supra* note 4, at 603.

and that Article XXI was self-judging – that is, it was up to the GATT party to determine what action was necessary to protect its essential security interests.[14] When Nicaragua requested a panel, the United States was able to use the consensus voting practice of the GATT (*i.e.* an action would not be taken unless all parties agreed) to ensure that the panel would not examine or judge the validity of the U.S. invocation of Article XXI as part of its terms of reference.[15] A panel report concluding that it could not find that the United States was or was not in compliance with its GATT obligations was issued in 1986; however, it was never adopted.[16] The embargo was removed March 13, 1990, shortly after democratic elections were held in the country.

The second invocation of the national security exception occurred in October 1996, and involved sanctions against Cuba.[17] The European Communities (EC) requested a panel to examine the consistency of the Helms-Burton Act[18] with a variety of WTO obligations. A panel was established in November 1996 with the terms of reference sought by the EC.[19] The United States subsequently invoked the national security exception and argued against the authority of the panel to hear the case.[20] After difficult negotiations, the United States and the EC settled their dispute, and in April 1997 the EC requested that the panel suspend its work. Ultimately, the panel's authority lapsed in 1998, pursuant to Article 12.12 of the DSU, and no conclusion was ever reached.[21]

The fact that in the Helms-Burton Act dispute a WTO panel was formally established does not appear to lend support to the proposition that national security issues are necessarily subject to review by international tribunals. Rather, panel establishment appears to have been a function of the WTO's rules pursuant to the DSU. As previously mentioned, prior to 1995 and the inception of the WTO, the GATT dispute settlement system operated on a consensus based system, meaning that one member could unilaterally block any action of the entire body, including the formation of panels to arbitrate disputes as well as adoption of

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[14] *Id.*

[15] *See id.* at 706; *see also generally,* Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558, 575-77 (1991)[hereinafter Hahn].

[16] *GATT Analytical Index, supra* note 3, at 601.

[17] Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 376-77 (2003).

[18] Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996).

[19] United States – The Cuban Liberty and Democratic Solidarity Act (WT/DS38). The case history is set forth in WTO Secretarial, *Update of WTO Dispute Settlement Cases*, 274 (March 1, 2006) (WT/DS/OV/26), *available at* www.wto.org [hereinafter WTO Dispute Settlement Update]; *see also generally*, John H. Jackson & Andreas F. Lowenfeld, *Helms-Burton, the U.S., and the WTO*, ASIL Insight, March 1997, *available at* www.asil.org/insights.htm [hereinafter Jackson & Lowenfeld].

[20] U.S. Says WTO Panel Not Competent to Judge Cuba Dispute, Hopes to Settle, 14 Int'l Trade Rep. 351 (BNA 1997).

[21] *WTO Dispute Settlement Update, supra* note 19, at 247; *see generally* Stefaan Smis & Kim Van der Borght, *Current Developments: The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts*, 93 AM. J. INT'L L. 227 (1999).

decisions reached by said panels.[22] Ratification of the WTO Agreements, and specifically, the DSU, amended that practice and currently prevents individual members from preventing the body from acting.[23] Under the current WTO rules, only a consensus vote not to take an action can prevent the body from proceeding. In any event, it is important to note that the establishment of the panel was a procedural action and, as such, was not determinative of what a panel's ruling may have been.

The issues of whether a WTO panel should have jurisdiction to hear a case in which the essential security exception (Article XXI) is invoked, and, if so, whether a panel should defer to the country invoking Article XXI, or whether it should examine a country's invocation of the exception to any significant extent, generally remain unresolved. To this point, the public record of the Helms-Burton dispute provides no evidence as to how the established panel may have ruled as the panel heard no arguments from any disputing party, was presented with no evidence, and most importantly rendered no written judgment. Furthermore, the argument that these actions by the WTO establish a precedent for the justiciability of national security issues seems to assume not only that the United States would not have prevailed had a decision actually been rendered by a panel, but also that the decision would have withstood appeal to the WTO's Appellate Body. To begin with, it is possible that a WTO panel may not have even reached the merits of such a dispute involving matters of national security. Should a panel have heard arguments and been required to render a decision, it remains possible that it would have determined that it did not have jurisdiction to render a decision on the merits. Even assuming that a panel would agree to decide such a case on the merits, there is nothing in the WTO record to indicate that it would have, in fact, decided against the United States's long established position that matters relating to national security are "self-judging" and that Article XXI should be interpreted in this way.[24]

Thus, should the United States, whether through CFIUS or congressional action prevent Omani companies from establishing "landside aspects of port activities," it would appear that such a measure could be justified pursuant to the "essential security" exception. While it is theoretically possible for Oman to bring a legal challenge to the actions of the United States before a third-party tribunal, the United States would appear to be on solid legal grounds for asserting not only that the panel does not have the legal authority to determine the validity of such a matter, but also that the inconsistent measure is permitted and justifiable given the broad "self-judging" language of the national security exception.

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[22] *See supra* notes 10 & 15 and accompanying text.

[23] *See id.*

[24] Several legal commentators have suggested ways in which a panel might approach jurisdictional issues as well as possible means of interpreting Article XXI in light of international law and other considerations. *See e.g.,* Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security As an Issue of Competence*, 93 AM. J. INT'L L. 424 (1999); *see also* Jackson & Lowenfeld, *supra* note 19; Renee E. Browne, *Revisiting "National Security" in an Interdependent World: The GATT Article XXI Defense After Helms-Burton*, 86 GEO. L. J. 405 (1997); Hahn, *supra* note15.